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AT&T Mobility LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

PATRICK HENDRICKS, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

AT&T MOBILITY, LLC,

Defendant.

Case No. CV 11-00409-CRB

SUPPLEMENTAL DECLARATION OF JAN MENDEL IN SUPPORT OF DEFENDANT AT&T MOBILITY LLC'S MOTION TO COMPEL ARBITRATION AND STAY CASE

Date: October 21, 2011
Time: 10:00 a.m.
Courtroom 8

Honorable Charles R. Breyer

I, Jan Mendel, hereby declare as follows:

1. The following facts are of my own personal knowledge, and if called as a witness I could and would testify competently as to their truth.

2. I submitted a declaration in this case to respond to plaintiff Patrick Hendricks's contention that AT&T Mobility LLC ("ATTM") routinely prevents consumers from pursuing arbitration by refusing to pay the American Arbitration Association ("AAA") for a consumer's filing fee or other arbitration costs when required to do so by the arbitration provision in the consumer's wireless service agreement.

3. In my earlier declaration, I explained that I am the Lead Discovery Manager with the AT&T Mobility LLC ("ATTM") Legal Department and am involved with the resolution of customer disputes under ATTM's arbitration provision. I also explained that, since ATTM committed itself to paying its customers' share of arbitration costs in qualifying cases in mid-2003, ATTM had never prevented a customer from obtaining relief via the arbitration process by refusing to pay those costs, with the sole exception of the arbitration demands recently submitted by the law firm of Bursor & Fisher, P.A. seeking to enjoin the proposed AT&T/T-Mobile merger.

4. I have read Mr. Hendricks's objection to my declaration, which asserts that I have not sufficiently explained how it is that I have personal knowledge of the facts in my declaration. I am submitting this supplemental declaration to respond to that objection.

5. To begin with, I have personal knowledge of ATTM's arbitrations with consumers because, since I joined the Litigation Group in the summer of 2004, after having been hired by the Legal Department in August 2003, I have been tracking every such arbitration. Although my title has changed over time, I have been involved with the ATTM consumer arbitration program since joining the Litigation Group.

6. ATTM was previously known as Cingular Wireless LLC ("Cingular"). One of my first tasks when I joined the Litigation Group of the Legal Department was to track the then-pending consumer arbitrations brought under the then-current Cingular arbitration provision (which had been implemented in July 2003). And I have continued to track those arbitrations.

Since late 2006, I have also been the designated person at ATTM to receive service of consumer demands for arbitration and to handle communications with the AAA about the arbitration program, including communications about billings for ATTM consumer arbitrations.

7. In addition, I maintain or have access to records of ATTM's arbitrations with consumers from mid-2003 to the present, including records of payments to the AAA and invoices from the AAA. According to those records, every invoice from the AAA during the relevant time period, with no exception of which I am aware or that I could find, was paid.

8. Given my role in ATTM's consumer arbitration program, I would have been aware of any attempt by ATTM since I joined the Litigation Group to prevent an arbitration from being administered by the AAA by deliberately refusing to pay the costs of that arbitration. For example, I would be aware if the AAA had terminated ATTM's consumer arbitration program; I have been informed by the AAA that if a business were to fail to pay arbitration costs that the AAA concludes that the business owes, the AAA will refuse to administer any arbitrations for that business.

9. In addition, it is my understanding that the AAA agrees that—with the sole exception of the recent arbitrations challenging the AT&T/T-Mobile merger filed by the Bursor & Fisher, P.A. law firm—ATTM consistently pays the costs of consumer arbitration. Attached as Exhibit 1 is a true and correct copy of a letter, which I retrieved from ATTM's files, from Eric Tuchmann, the AAA's General Counsel, to a lawyer representing an ATTM customer who had brought an arbitration under ATTM's consumer arbitration provision. In the letter, Mr. Tuchmann explained that the AAA had selected ATTM (among other companies) for a pilot program under which consumer cases would be accepted for administration even before the business had paid the fees because those companies had "historically complied" with their obligation under the AAA's Consumer Due Process Protocol to pay those fees.

10. Finally, in my earlier declaration, I had noted that ATTM had paid the costs of arbitration even when the consumer had breached the arbitration provision by first filing a lawsuit in a court before initiating arbitration. I have personal knowledge of that fact because I also track consumer lawsuits against ATTM, including at least one that led to a consumer

arbitration. For example, after one customer breached her consumer arbitration agreement by filing a class action, the court compelled arbitration, and ATTM paid the costs of that arbitration. Attached as Exhibit 2 is a true and correct copy of the court order compelling arbitration in *Davidson v. Cingular Wireless LLC*, No. 2:06-cv-00133-WRW, 2007 WL 896349 (E.D. Ark. Mar. 23, 2007). Attached as Exhibit 3 is a true and correct copy of a letter from the AAA confirming the filing of the customer's demand for arbitration and requesting that ATTM pay the arbitration costs. Attached as Exhibits 4 and 5 are true and correct copies (with some information redacted) of a fax to the AAA confirming a credit card payment of that invoice, as well as a check to the customer's attorney for the cost of the AAA filing fee. And attached as Exhibit 6 is a true and correct copy of the arbitrator's award, which confirms on page 4 that the administrative filing and case service fees and the arbitrator's fees and expenses "shall be borne as incurred."

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 19 2011, at Atlanta, Georgia

J Mendel

Jan Mendel

EXHIBIT 1

American Arbitration Association
Dispute Resolution Services Worldwide

Eric P. Tuchmann
General Counsel and Corporate Secretary

1633 Broadway, Floor 10, New York, NY 10019-6708
telephone: 212 716 3937, facsimile: 212 716 5901
www.adr.org
email: TuchmannE@adr.org

July 18, 2011

Robert N. Melching, Esq.
Edelson McGuire, LLC
350 North LaSalle, Suite 1300
Chicago, IL 60654

Re: Consumer Arbitrations

Dear Mr. Melching:

This acknowledges receipt of your letter dated July 12, 2011, which is inaccurate in its description of various aspects of the American Arbitration Association's ("AAA") administration of consumer arbitrations, and which does not correctly memorialize your discussions with AAA staff. The following attempts to address the issues raised in your letter and to explain various components of the AAA's administration of consumer arbitrations.

The AAA's Administration of Consumer Arbitrations

The AAA is an independent and neutral not for profit organization that is committed to prompt, effective and fair methods of dispute resolution. The AAA's administration of consumer arbitrations is guided by the principles contained in the Consumer Due Process Protocol ("Protocol") that was developed with the input of a diverse national committee that included representatives from the judiciary, consumer advocates, and other interested groups. The AAA has also incorporated the Protocol into its Supplementary Procedures for Consumer Related Disputes. Further, the AAA's administration of consumer arbitrations has been thoroughly studied by the Searle Civil Justice Institute, which at the time of the study was associated with Northwestern University School of Law. An executive summary of that study, *Consumer Arbitration Before the American Arbitration Association,* is available at www.law.northwestern.edu/jep/symposia/documents/JEP_CJ_2009_Drahozal2.pdf.

At the time a demand for arbitration is filed where a consumer is a party, the applicable arbitration clause is reviewed for compliance with the Protocol, which requires that various

minimum fairness requirements are met. If there is a provision in the arbitration agreement that contains a Protocol violation, the AAA notifies the company of the deficiency and the AAA requires that the business waive the portion of the arbitration agreement that contains the Protocol violation. If the company refuses to do so, the AAA declines to administer the arbitration, and all other consumer arbitrations involving that company. As a result of this procedure, the AAA has declined to administer arbitrations for hundreds of companies. This procedure was instituted as a reflection of the AAA's commitment to the Protocol, and to help assure that minimum standards of fairness would be achieved within the arbitral forum.

The process to address a consumer's concern that a particular arbitration agreement contains a Protocol violation is that the consumer, at their option, may raise their concern with the AAA once the case is filed. If the AAA determines that the arbitration clause violates the requirements of the Protocol, then the process described above applies. However if the AAA determines that the arbitration agreement does meet the requirements of the Protocol, the AAA will proceed with the administration of the arbitration at which time the consumer can raise the Protocol violation with the arbitrator who is not bound by the AAA's prior administrative determination. In addition, it is the AAA's experience that issues regarding protocol violations may be litigated either prior to or even after the AAA commences administration of an arbitration. To the extent that a court directs the parties to an arbitration agreement to proceed to arbitrate in a particular manner, the AAA will comply with that court order as well.

One of the Protocol's requirements is that an arbitration program must entail reasonable costs to consumers. As a result, the AAA's consumer arbitration process shifts the large majority of the costs of the arbitration process to the business in an effort to ensure that consumers are not saddled with the costs of the arbitration process. The extent to which fees are shifted are reflected in the AAA's Supplementary Procedures for Consumer Related Disputes. In the event that a business refuses to pay its share of the costs of the arbitration process, the AAA informs that business that the AAA will not administer any future consumer arbitrations involving that company. The AAA instituted that process, in part, to eliminate the ability of businesses to cherry pick which cases they wanted to arbitrate and which they wanted to litigate. Consequently, it is not correct to suggest that businesses have a unilateral right to avoid arbitration. Perhaps even more relevant to that point, under the Protocol and the AAA's Consumer Rules all parties are given the choice to opt out of the arbitration process altogether and into a small claims court.

Finally, regarding the process for naming the AAA as the administering organization in consumer arbitration agreements, the AAA is frequently unaware that it has even been written into such agreements until a demand for arbitration is filed. The AAA does not have contracts with businesses that provide for the AAA's administration of consumer arbitrations, nor does the AAA draft consumer arbitration agreements for businesses.

The Case Intake Process and the "Pilot Program"

The AAA has a devoted case intake team that is composed of a sufficient number of individuals to process the number of cases historically filed with the AAA. To the extent that there is a dramatic change as a result of legal developments, or otherwise, the AAA would adjust the number of individuals on the intake team.

Regarding the "Pilot Project" referenced in your letter, that project was instituted at the AAA's own initiative, with a view toward expediting the arbitration process for consumers. The majority of consumer arbitrations filed with the AAA last year, which numbered a total of approximately 1,000 cases, were filed by consumers against businesses, and before the pilot was instituted, consumers had to wait weeks before the arbitration would start because it frequently took that long before the business respondent paid their share of administrative fees. In an effort to alleviate the frustration experienced by consumers waiting for their arbitrations to proceed, the AAA decided to commence with the administration of certain cases under the pilot project without having the businesses' portion of the cost of the arbitration on deposit.

To roll out the project, the AAA identified organizations that had historically complied with the AAA's Protocol. The pilot project is a purely internal AAA administrative process and does not give any advantage to either party. The AAA does not invite or negotiate with businesses to be a part of the pilot program. In fact, the AAA has not even affirmatively notified businesses that they are in the program. At the same time, the AAA readily volunteers that a case is in the pilot program when prompted to do so, as was the case here.

Information About Consumer Arbitrations

You have requested various information about the AAA's administration of AT&T consumer arbitrations. Virtually all of that information is disclosed on a publicly accessible and searchable Excel database on the AAA's website at www.adr.org/sp.asp?id=22042. That database lists every consumer arbitration administered by the AAA nationwide that was filed and concluded during the time period July 1, 2006 to June 30, 2011. Also on that database is the name of every arbitrator appointed to those cases, the monetary amount in dispute, the

disposition of the arbitration, which party prevailed, certain cost information, as well as a variety of additional information.

AAA Arbitrators

AAA arbitrators are independent, impartial decision-makers chosen for their experience, integrity, and dispute resolution skills. AAA arbitrators are subject to a careful screening process before they are accepted to the AAA's Roster of Neutrals. In addition to having substantial professional experience, applicants to the AAA's Roster of Neutrals are also evaluated for, among other criteria, their ability to fairly manage the arbitration process, their commitment to the Code of Ethics, and their neutrality. In your letter, you question the motivation for arbitrators to serve in consumer arbitrations. Their willingness to serve in consumer arbitrations reflects both a strong public service commitment and dedication to the alternative dispute resolution process.

An AAA arbitrator's conduct is guided by the Code of Ethics for Arbitrators in Commercial Disputes, which was prepared by a Joint Committee of the AAA and the American Bar Association. The Code of Ethics is widely accepted as providing the generally accepted standards of ethical conduct for arbitrators and parties in connection with arbitration proceedings. AAA arbitrators also sign an oath in connection with each case stating that they will abide by the Code of Ethics.

Before they accept appointment to a specific case, all arbitrators are responsible for completing a conflicts check for any past or present relationships with either party, potential witnesses or the parties' representatives. If the arbitrator has any such relationships, all of the parties will be provided that information. The parties are then given the opportunity to comment on whether that individual should remain as the arbitrator in light of the disclosure. Disclosure would therefore be required if an arbitrator heard a prior AT&T case, and that arbitrator would be subject to removal based on that disclosure. The arbitrator's disclosure obligations continue throughout the period of appointment.

Requested Information and Documents

You have requested additional information and documents concerning the AAA administration of consumer disputes, and arbitrations involving AT&T in particular. The first request asks for a list of all arbitrators currently arbitrating consumer cases in the United States, along with the number of consumer and commercial cases handled with respect to AT&T. As previously stated, information regarding AT&T's consumer cases, the identity of the arbitrators, as well as

additional information regarding those cases are already provided publicly and are available to you at the web address indicted above. Furthermore, any arbitrator who is selected by the parties is required to disclose any prior service on AT&T cases, whether commercial or otherwise, and any other relationship that exists with the parties, their counsel or witnesses in the dispute.

You have also asked for all correspondence between the AAA and AT&T, as well as a list of individuals who have spoken with AT&T. As a neutral provider of alternative dispute resolution proceedings, the AAA has communications with thousands of parties and counsel every year. These communications either occur generally or relate to a specific case file. Parties are entitled to a copy of the case file relating to their case, which would include any such communications made concerning that case. Your request, however, is substantially broader and would require the AAA to search the entire organization for all documents relating to possible communications with AT&T, some of which would include confidential documents contained in case files relating to arbitrations involving other parties, including consumers. The AAA declines to engage in the far reaching inquiry that you request.

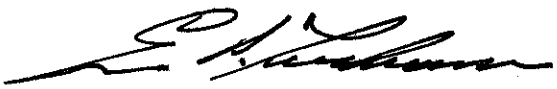
The third request asks for "any findings by the AAA regarding why the AT&T clause complies with AAA due process." As previously stated, the AAA's determination that a clause complies with the Protocol is a purely administrative task that is performed by AAA staff. The AAA does not issue any findings with respect to this decision. Any party is free to challenge compliance with the Protocol directly with the arbitrator.

The fourth request asks for documentation or training materials released by the AAA regarding requirements for eligibility to be part of the AAA pilot program. In light of the fact that the pilot program is a purely internal AAA procedure, no such documents have been released.

Finally, you ask for a list of all businesses that are currently a part of the AAA pilot program, or under consideration for that program. However, it is unclear how this information relates to the issues that you are raising with respect to your clients. Moreover, this pilot program is primarily for the benefit of consumers with the goal of allowing their arbitrations to move forward in an expeditious manner, which is one of the hallmarks of alternative dispute resolution. If you prefer not to have any of your arbitrations proceed as part of the pilot program, please notify your case manager and your case will not be included as part of that program. In addition, to the extent that you represent consumers in arbitrations involving companies other than AT&T, you should feel free to inquire after a demand for arbitration has been filed if the company in question is also part of the pilot program.

I trust that this is responsive to your questions. The AAA continuously seeks constructive commentary from all parties with regard to cases administered by the AAA, and to the extent that you have suggestions on how the AAA can improve the arbitration process for parties to consumer arbitrations, we would be interested in hearing those suggestions as well.

Very truly yours,



Eric P. Tuchmann

EXHIBIT 2

Davidson v. Cingular Wireless LLC
E.D.Ark.,2007.
Only the Westlaw citation is currently available.
United States District Court,E.D. Arkansas,Eastern Division.
Barbara DAVIDSON, Plaintiff
v.
CINGULAR WIRELESS LLC, d/b/a Cingular Wireless, Defendant.
No. 2:06CV00133-WRW.

March 23, 2007.

Brian David Reddick, Deborah Truby Riordan, Wilkes & McHugh, P.A., Mark W. Nichols, Nichols & Campbell, P.A., Little Rock, AR, for Plaintiff.
Philip E. Kaplan, Kaplan, Brewer, Maxey & Haralson, P.A., Little Rock, AR, Seamus C. Duffy, William M. Connolly, Drinker Biddle & Reath, LLP, Philadelphia, PA, for Defendant.

ORDER

WM. R. WILSON, JR., United States District Judge.
***1** Plaintiff subscribes to wireless telephone service provided by Defendant ("Cingular"). In her Amended Complaint and Request for Class Action, she alleges that Cingular has "consistently charged late payment charges on past due accounts" that "are interest under Arkansas law and violate usury provisions of Article 19, § 13 of the Arkansas Constitution." [FN1] Cingular maintains that by obtaining service, Plaintiff agreed to the arbitration agreement found in its Wireless Service Agreement ("WSA"). Based on the WSA, Cingular has filed a Motion to Compel Arbitration (Doc. No. 10). Plaintiff has responded (Doc. No. 28 and 41).

FN1. Doc. No. 5.

I. Background

A. Procedural

This case was first filed on March 20, 2003, in the circuit court of Phillips County, Arkansas, alleging that Defendant engaged in deceptive and misleading marketing and billing practices. Defendant removed the case on May 14, 2003. [FN2] The case was remanded to state court after a hearing on September 3, 2003.

FN2. *Davidson v. Cingular,* No. 2:03CV00067-WRW (E.D.Ark. May 14, 2003).

Plaintiff amended her complaint on April 18, 2006, adding a usury claim. Plaintiff argued that the late fees charged by Defendant were usurious in violation of Article 19, Section 13 of the Arkansas Constitution. On May 17, 2006, Defendant filed a second Notice of Removal.[FN3] Plaintiff responded by once again filing a Motion to Remand (Doc. No. 16). After an October 11, 2006 hearing on the Motion to Remand, the motion was denied by Order (Doc. No. 32) entered on October 12, 2006.

FN3. Doc. No. 1.

B. Factual

After the case had been remanded to the Phillips County Circuit Court in 2003, Cingular moved to compel Plaintiff to arbitrate her claims under the terms of the WSA. Plaintiff objected, claiming that she had never signed a WSA containing an arbitration agreement. Plaintiff was right. Cingular searched its records and located a WSA between Plaintiff and Southwestern Bell Wireless (Cingular's predecessor) that did not contain an arbitration provision. Based on that finding, Cingular withdrew its motion to compel arbitration, but did so "without prejudice to its moving for arbitration in the future should it discover that plaintiff has, in fact, signed a contract containing an arbitration provision." [FN4]

FN4. Doc. No. 11; *See also* Doc. No. 10-3.

Before removal, on April 18, 2006, Plaintiff filed an Amended Complaint, in which, Cingular argues, she "purported to represent an entirely new class with entirely new claims" and abandoned her "prior challenges to Cingular's arbitration provision." [FN5] After receiving the Amended Complaint, Cingular searched its records again looking for any WSA that Plaintiff may have executed since the 2003 Motion to

Compel Arbitration had been withdrawn. Cingular discovered that Plaintiff signed a WSA on July 12, 2004, in which she acknowledged having read the agreement that included the following arbitration provision:

FN5. Doc. No. 11.

Please read this carefully. It affects your rights. Cingular and you ... agree to arbitrate all disputes and claims arising out of or relating to this Agreement, or to any prior oral or written agreement for Equipment or services between Cingular and you.... You agree that, by entering into this Agreement, you and Cingular are waiving your right to trial by jury.... You and Cingular agree that YOU AND CINGULAR MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding. Further, you agree that the arbitrator may not consolidate proceedings or more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding.... [FN6]

FN6. Doc. No. 10-2 (emphasis in original).

***2** Plaintiff renewed her service again on October 21, 2005 either over the phone or by computer; [FN7] therefore, a signed WSA for October 21, 2005, does not exist.[FN8] Nevertheless, the arbitration provision in the October WSA was identical to the one Plaintiff signed in July 12, 2004.[FN9]

FN7. Doc. No. 11.

FN8. *See* *Daisy Mfg. Co., Inc. v. NCR Corp.*, 29 F.3d 389, 292 (8th Cir.1994) (Applying Arkansas law to arbitration dispute, the Eighth Circuit held that parties can become contractually bound absent their signatures.); *see also* *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 846 (2d Cir.1987) (citing 9 U.S.C. § 3) (Holding that although the FAA requires a writing, it does not require that the writing be signed by the parties.).

FN9. *Id.*

Based on these findings, Cingular has once again moved to compel arbitration. Arguments were heard from both parties in a hearing held on March 16, 2007.

II. Standard of Review

The Federal Arbitration Act ("FAA") was created to establish "a liberal federal policy favoring arbitration agreements." [FN10] As I noted at the March 16th hearing, I doubt an informed general public would be enthusiastic about giving up the right to trial by jury; nevertheless, Congress has declared mandatory arbitration to be the policy of the land-and the Courts have honored this Congressional "finding." In the Eighth Circuit, arbitration is required if a valid agreement exists and the dispute falls within the scope of the agreement.[FN11] The FAA mandates that courts "shall direct parties to arbitration on issues to which a valid arbitration agreement has been signed." [FN12]

FN10. *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 223 F.3d 721, 724 (8th Cir.2003) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

FN11. *Casteel v. Clear Channel Broadcasting, Inc.*, 254 F.Supp.2d 1081, 1087 (W.D.Ark.2003) (quoting *Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943, 945 (8th Cir.2001)).

FN12. *Id.* (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985)).

Whether an arbitration agreement has been entered into is a question of law, controlled by the applicable state contract law.[FN13] Arkansas law provides that the essential elements of a contract are: (1) competent parties; (2) subject matter; (3) legal consideration; (4) mutual agreement; and (5) mutual obligations.[FN14]

FN13. *Id.*

FN14. *Id.* (citing *Williamson v. Sanofi Winthrop Pharm., Inc.*, 60 S.W.3d 428 (2001)).

III. Analysis

Defendant maintains that the WSA agreed to by Plaintiff governs this matter and requires arbitration.

Defendant argues that the arbitration agreement in the WSA is valid and written in compliance with the FAA.[FN15] Before determining whether the FAA applies, the validity of the contract must first be determined.[FN16]

FN15. 9 U.S.C. § 2.

FN16. *Linville v. ConAgra, Inc.*, No. 1:04CV00004-WRW, 2004 WL 3167119 (E.D.Ark. May 19, 2004) (citing *Lyster*, 239 F.3d 943).

Arbitration agreements are governed by general principles of contract law and determinations as to their terms and limits are questions of law.[FN17] A threshold inquiry is whether an agreement to arbitrate exists; that is, whether there has been mutual agreement, with notice as to the terms and subsequent assent.[FN18] A court cannot make a contract for the parties but can only construe and enforce the contract that they have made.[FN19] If there is no meeting of the minds,[FN20] there is no contract.[FN21] Both parties must manifest assent to the particular terms of the contract in order for there to be a meeting of the minds.[FN22]

FN17. *Alltel Corp. v. Sumner*, 203 S.W.3d 77, 79 (2005).

FN18. *Id.* at 576-577.

FN19. *Id.*

FN20. I was taught in law school that Corbin & Williston condemned the phrase "meeting of the minds" because it suggested an "outdated subjective theory of contracts"-but since appellate courts continue to use it apace, I'll use it.

FN21. *Id.*

FN22. *Id.* (citing *Van Camp v. Van Camp*, 969 S.W.2d 184 (1998)).

A. WSA

Plaintiff first argues that the there was no mutual agreement; therefore, the WSA is not mutually binding.[FN23] Plaintiff contends her usury claims cannot be brought in small claims court, which forces her into arbitration. Even if Plaintiff were to arbitrate, she argues the WSA "effectively precludes her from receiving any meaningful recovery" [FN24] because of the "hold harmless" provision which precludes money damages only allowing injunctive relief. The agreement also precludes indirect, special, consequential, incidental, and punitive damages. Finally, Plaintiff argues that the WSA lacks mutuality because it disallows any consolidation of claims or class actions.

FN23. *Scherry v. A.G. Edwards & Sons, Inc.*, No. 02-2286, 2003 U.S. Dist. LEXIS 11010, *10 (W.D. Ark. April 15, 2003) ("[M]utuality of obligation is not required for arbitration clauses so long as the contract as a whole is supported by consideration.").

FN24. Doc. No. 28-1.

***3** Plaintiff argues that the small claims provision destroys any mutuality of obligation because "Cingular has the option of pursuing all claims it could possibly have against a customer in small claims court" but subscribers cannot sue Cingular in small claims court because "constitutional" and "statutory construction" claims cannot be brought there.[FN25] Defendant argues that although Plaintiff's claims arise from a consumer protection statute [FN26] and the Arkansas Constitution, she is not challenging their validity or questioning their "construction;" instead, she is arguing that a portion of the contract is usurious. However, the only limitations that currently exist on small claims actions is that Plaintiff may not be represented by counsel and can seek no more than $5000. There is simply nothing currently in the law that prevents Plaintiff from raising a contract claim in small claims court-even if it alleges that a provision of that contract is usurious.[FN27]

FN25. Doc. No. 29-1.

FN26. Plaintiff claims violations of the Arkansas Consumer Trade Practices Act, Ark.Code Ann. § 4-88-201-4-88-607 (Repl.2001 and Supp.2005).

FN27. Ark.Code Ann. § 16-17-206(a) and Ark. Const. amend. 80, § 7 (small claims courts have exclusive jurisdiction over in all matters of contract where the amount of controversy does not exceed $100, and it has concurrent jurisdiction with circuit courts in matters of contract where the amount in controversy does not exceed $5,000).

Plaintiff cites several check cashing cases recently decided by the Arkansas Supreme Court, in which it struck down the arbitration provisions in form contracts because there was a demonstrated lack of mutuality of contract. [FN28] "Mutuality of contract means that an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other; that is, neither party is bound unless both are bound." [FN29] A contract, therefore, that leaves it entirely optional with one of the parties as to whether or not he will perform his promise would not obligate the other." [FN30]

FN28. *See The Money Place, LLC v. Barnes,* 78 S.W.3d 714 (2002), *Cash in a Flash Advance of Arkansas, LLC. v. Spencer,* 74 S.W.3d 600 (2002); *Showmethemoney Check Cashers, Inc. v. Williams,* 27 S .W.3d 361 (2000).

FN29. *The Money Place, LLC v. Barnes,* 78 S.W.3d 714, 716-717 (2002).

FN30. *Id.*

Cingular notes that the series of check-cashing cases relied on by Plaintiff had arbitration agreements which were facially unilateral; they required the customer to submit all disputes to arbitration, while the check casher reserved the right to seek judicial redress. Cingular points that its WSA provides that "either party" may seek relief before a small claims court or before an arbitrator. Defendant cites an Eleventh Circuit opinion, in which the court rejected a mutuality argument like Plaintiff's, finding that "[t]he promises are mutual: both parties are required to arbitrate covered claims, and neither is required to arbitrate non-covered claims." [FN31] Likewise, Defendant maintains that it is equally required to arbitrate, and is therefore mutually bound. I agree.[FN32] "The arbitration clause at issue allows arbitration at the election of either party. Therefore plaintiff as well as defendant has the choice to require the other to litigate and resolve any dispute by arbitration. Accordingly, Plaintiffs lack of mutuality argument fails." [FN33]

FN31. *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir.2005).

FN32. *Evans, et al. v. Direct General Insurance,* No. 4:04CV00942 (E.D. Ark March 11, 2005).

FN33. *Id.*

In 2006, Cingular amended the arbitration provision of its WSAs. Every subscriber was sent a copy of the revised arbitration provision in their December 2006 bills. The amended section was also posted on Cingular's website. Plaintiff and her counsel received a copy of the amendment.

***4** The 2006 arbitration provision allows subscribers the exclusive right to choose the manner in which the arbitration will be carried out: they can select an in-person hearing, a telephone hearing, or a "desk" arbitration decided solely on documents provided to the arbitrator. If the subscriber is awarded greater relief than Cingular's last written settlement offer, "Cingular will ... pay [the subscriber's] attorney, if any, twice the amount of attorneys' fees [the subscriber's] attorney reasonably accrues for investigating, preparing, and pursuing [the subscriber's] claim in arbitration." [FN34]

FN34. Doc. No. 34.

Plaintiff argues that because the July 2004 WSA has been amended, changed, and withdrawn, it is no longer applicable. Cingular points out that it has amended its WSAs to make them more consumer-friendly and that by posting it on its website, it has unilaterally made the 2006 arbitration provision "the governing provision." [FN35] Plaintiff maintains that she is not bound by any of the WSAs because "there can be no mutual obligation when one party to the agreement can unilaterally change the terms of the arbitration provision." [FN36] Plaintiff argues that a party's express reservation of the ability to make a substantial, unilateral amendment to its contract after the fact to improve its position in litigation is itself unconscionable and should not be enforced.[FN37]

FN35. Doc. No. 41.

FN36. *Id.* (quoting *Asbury Automotive Used Car Center, LLC v. Brosh,* 364 Ark. 386 (2005) ("neither party to an arbitration is bound unless both are bound.")).

FN37. *See Kinkel v. Cingular Wireless, LLC,* 857 N.E.2d 250 (Ill.2006).

In response, Cingular argues that it cannot unilaterally change its *arbitration* provision, but submits that it can properly amend the *other* terms and conditions of the WSA. If Cingular attempts to amend the arbitration provision of the WSA, a subscriber may, if they disagree with the amendment, refuse to submit to the change. With millions of subscribers, Cingular highlights the difficulty of Plaintiff's suggestion that it should receive the consent of each of its customer's to change its contracts.

Cingular argues that assent to the terms of the WSA was indicated by the continued use and benefit of its cellular services.[FN38] For a party to assent to a contract, the terms of the contract must be effectively communicated.[FN39] Plaintiff argues that the terms were not effectively communicated; therefore, holding her to the terms would be unconscionable.

FN38. *See* *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir.1997) (Court held that plaintiff that ordered a computer over the telephone, was bound by the terms and conditions, which contained an arbitration clause, that were included in the box with the computer because he kept the computer.).

FN39. *Id.* (citing *Crain Indus., Inc. v. Cass*, 810 S.W.2d 910 (1991)).

In response to Plaintiff's argument that she had no knowledge of the arbitration provision or any choice in entering into it, Cingular points out that it had already filed a motion to compel arbitration 480 days before Plaintiff opted to enter a Cingular store and sign the July 14, 2004 WSA agreement. Cingular asserts that it did not amend the terms and conditions and "foist" them on Plaintiff as she contends; instead, Cingular says she readily and voluntarily agreed to them by signing the WSA. Furthermore, although Plaintiff received the 2006 revision to the WSA months ago, Cingular notes that "she has not chosen to reject that provision, as she is free to do." [FN40]

FN40. Doc. No. 44.

Based on the above, Cingular has established the elements of contract exist under Arkansas law, and that there was mutual assent to the terms through Plaintiff's continued used of its services.

B. Unconscionability

***5** An agreement to arbitrate is enforceable unless a recognized contract defense, such as unconscionability exists.[FN41] Plaintiff, the party opposing arbitration, has the burden of proving the arbitration provision is unconscionable.[FN42] The Arkansas Supreme Court has adopted the following test for determining unconscionability in contract cases:

FN41. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686-687 (1996).

FN42. *Pro Tech Industries, Inc. v. URS Corp.*, 377 F.3d 868, 873 (8th Cir.2004).

In assessing whether a particular contract or provision is unconscionable, the courts should review the totality of the circumstances surrounding the negotiation and execution of the contract. Two important considerations are whether there is a gross inequality of bargaining power between the parties to the contract and whether the aggrieved party was made aware of and comprehended the provision in question.[FN43]

FN43. *State ex rel. Bryant v. R & A Inv. Co., Inc.*, 985 S.W.2d 299, 302 (1999) (quoting *Arkansas Nat'l Life Ins. Co. v. Durbin*, 623 S.W.2d 548, 551 (1981)).

When addressing the alleged unconscionability of an arbitration agreements, courts have divided their analysis into two categories: (1) procedural and (2) substantive. "Procedural unconscionability refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it." [FN44] Courts look to the circumstances surrounding the transaction including the manner in which the contract was entered into, whether each party had a reasonable opportunity to understand the terms of the contract, and whether important terms were hidden in a maze of fine print.[FN45]

FN44. *Kinkle v. Cingular Wireless LLC*, 857 N.E.2d 250, 254 (Ill.2006).

FN45. *Id.*

Substantive unconscionability looks to the actual terms of the contract to see if they are one-sided. Substantiative unconscionability includes questions such as waiver of a class action, arbitration provisions, and requirements to seek redress in small claims court.[FN46]

FN46. *Id.*

1. Procedural Unconscionability

Plaintiff argues that she should not be bound by "a litany of 'Terms and Conditions' which are buried on the reverse of an invoice...." [FN47] Plaintiff goes on to argue that Cingular prepared its arbitration terms "unilaterally from a grossly-superior bargaining position." [FN48] Here, the contract is presented on a "take-it-or-leave-it" basis; but, Cingular maintains that Plaintiff had plenty of time to read and review the contract and the arbitration provision was clearly marked.

FN47. Doc. No. 28-1.

FN48. *Id.*

Plaintiff compares her case to *Alltel Corp. v. Sumner,*[FN49] in which Alltel sought to have a lawsuit stayed and arbitration compelled arguing that the plaintiffs had signed a service contract that included an arbitration clause. In support of its motion, Alltel filed an affidavit stating that according to Alltel's practices and procedures, plaintiffs would have been given the terms and conditions to the contract and no service would have been provided until the terms and conditions were in place. The trial court denied Alltel's motion to compel arbitration stating that Alltel offered insufficient proof that the arbitration clause was communicated to the plaintiffs. The Arkansas Supreme Court affirmed, holding that no agreement to arbitrate existed because it had not been shown that plaintiffs had received the agreement.

FN49. 203 S.W.3d 77 (2005).

***6** Plaintiff's reliance on *Alltel* is misplaced because Plaintiff acknowledges that she signed a WSA on July 12, 2004, and that its terms and conditions appear on the reverse of the document. Furthermore, the terms and conditions that appear on the reverse of the WSA, and the reverse of the carbon copy she was given for her records, contained a written arbitration agreement.

In *Iberia Credit Bureau,*[FN50] plaintiffs brought putative class actions against several cellular telephone service providers, including Cingular, alleging that certain deceptive billing practices constituted breaches of contract and violations of the Louisiana Unfair Trade Practices Act. The action was removed to federal court on the basis of diversity.

FN50. *Iberia Credit Bureau, Inc. v. Cingular Wireless, LLC.*, 379 F.3d 159 (5th Cir.2004).

The plaintiffs in *Iberia Credit* attempted to prove procedural unconscionability based on the contract's fine print. The court of appeals found type size to be a relevant consideration, but held that fine print alone does not automatically mean that an arbitration clause procedurally unconscionable, as long as the type used in the arbitration provision is the same size as that used in the rest of the contract.[FN51]

FN51. *Id.* at 172.

Defendant maintains that Plaintiff's argument that the arbitration provision was "buried in fine print" is unsubstantiated. The language of an arbitration provision need only be as prominent as the language in the rest of the contract; it need not be more prominent and is not required to be separately executed or initialed.[FN52] In this case, the arbitration provision is not less conspicuous but more prominent. Arbitration is written in bold and in all caps followed by the warning "Please read this carefully. It affects your rights."

FN52. *Arkcom digital Corp. v. Xerox Corp.*, 289 F.3d 536 (8th Cir .2002) (relying on *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (holding that § 2 of the FAA preempted state statute that imposed typography requirements on arbitration notices)).

Defendant argues that although its WSA is a form contract, such contracts are "an integral part of modern commerce." [FN53] The use of a form contract, alone, does not evidence unconscionability.[FN54] Again, I agree with Defendant. The WSA is not procedurally unconscionable, because Plaintiff had time to consider the arbitration provision, she agreed

to two more contracts since this case arose, and she has not opted to reject the arbitration provision as allowed in the 2006 revision. Finally, because the 2006 WSA was "effective on receipt" [FN55] and Plaintiff did not opt to reject the new WSA, the 2006 WSA governs.

FN53. Doc. No. 29-1.

FN54. *See Geldermann & Company, Inc. v. Lane Processing, Inc.,* 527 F.2d 571, 576 (8th Cir.1975 ("the fact that the provision is part of a printed 'form' contract does not render it automatically unenforceable....").

FN55. Doc. No. 34, Ex. A.

2. Substantive Unconscionability

As previously stated, substantive unconscionability depends on the actual terms of the contract; i.e., are they one-sided? Plaintiff argues that the WSA is substantively unconscionable because it precludes class actions and damages.

Plaintiff alleges that because her claims are so small, class litigation provides the most "economically feasible avenue," [FN56] and that Cingular has effectively protected itself against all potential litigation. In sum, Plaintiff states:

FN56. Doc. No. 28-1.

... the bar of collective proceedings has the effect of immunizing the Defendant from low-value claims, no matter how meritorious those claims might be. Cingular can, accordingly, wrong its customers with impunity so long a it does not harm any particular person to a degree that makes it worthwhile to pursue an arbitration case-and even then, the hold harmless provisions prevent any recovery.[FN57]

FN57. *Id.*

***7** In *Iberia Credit,* cited above, the Fifth Circuit also addressed preclusions of class actions. The plaintiffs in *Iberia Credit* argued that the bar on collective proceedings had "the effect of immunizing the defendants from low-value claims, no matter how meritorious those claims might be," and that the arbitration clause was "not so much an alternative method of dispute resolution" as it was "a system for avoiding liability altogether." [FN58]

FN58. *Id.* at 174.

The *Iberia* Court rejected plaintiffs' claim of substantive unconscionability for many reasons, not the least of which was that Cingular's arbitration clause expressly permitted customers "to bring inexpensive small-claims actions." [FN59]

FN59. *Id.* at 175 n. 19.

Small claims actions in Arkansas, by definition, prevent legal representation. [FN60] However, a subscriber could have an attorney if she opted to go to arbitration.

FN60. The district courts have the following subject matter jurisdiction in civil cases: exclusive in all matters of contract where the amount of controversy does not exceed $100, excluding interest, costs, and attorneys' fees; concurrent with circuit courts in matters of contract where the amount in controversy does not exceed $5,000, excluding interest, costs, and attorneys fees; concurrent with circuit courts in actions for the recovery of personal property whose value does not exceed $5,000; and concurrent with circuit courts in matters of damage to personal property where the amount in controversy does not exceed $5,000, excluding interest and costs. Arkansas Civil Practice and Procedure § 2-5.

In *Hutcherson v. Sears Roebuck & Co.,*[FN61] the Illinois Court of Appeals applying Arizona law, found a provision in a credit card agreement that required the claimant to choose between small claims court or arbitration of any claim was not substantively unconscionable. The agreement provided that the claimant could not participate as a representative or a member of a class of claimants. The *Hutcherson* Court based its findings on the fact that the arbitration provision containing the class action waiver required the credit card company to advance any fees required of the claimant by the National Arbitration Forum and provided that the claimant could not be required to refund the advanced fees unless the arbitrator determined that the claim was frivolous. Thus, the cost to the

claimant of submitting a nonfrivolous claim to arbitration would be minimal.

FN61. 793 N.E.2d 886 (Ill.App.2003).

The Illinois Court of Appeals reaffirmed the *Hutcherson* decision in *Kinkle v. Cingular Wireless, LLC*.[FN62] In *Kinkle,* the Court, having reviewed case law from around the country, noted a pattern-"a class action waiver will not be found unconscionable if the plaintiff had a meaningful opportunity to reject the contract term or if the agreement containing the waiver is not burdened by other features limiting the ability of the plaintiff to obtain a remedy for the particular claim being asserted in a cost-effective manner." [FN63]

FN62. 857 N.E.2d 250 (Ill.App.2006).

FN63. *Id.* at 274.

Plaintiff next argues that no ordinary consumer should be expected to appreciate that punitive damages are prohibited under the arbitration agreement. Cingular responds that, although its contracts once limited damages, the July 14, 2004 WSA signed by Plaintiff contains "only a general limitation of liability that applies primarily to service interruptions and personal injury claims." [FN64] Cingular argues the limitation only prevents customers from recovering punitive damages when the customer suffers as a result of the customer's use or inability to use the service. Defendant contends that the current WSA does not prohibit customers like Plaintiff from recovering punitive damages. Moreover, the limitation only applies if "applicable law precludes parties from contracting to so limit liability." [FN65]

FN64. Doc. No. 29-1.

FN65. *Id.*

***8** I find that the 2006 WSA (1) affords subscribers a convenient arbitral forum, (2) requires Cingular to pay the full cost of arbitrating any non-frivolous claims; (3) permits subscribers to proceed in small claims court if they prefer that means of dispute resolution; (4) does not require confidentiality; (5) does not prohibit punitive damages; (6) provides that arbitration will be conducted under the procedures set out by the American Arbitration Association; (7) and permits subscribers to reject future substantive changes to the arbitration provision.

B. FAA

In order for the FAA to apply, arbitration agreements must meet two conditions: (1) they must be in writing; and (2) they must be part of a "contract evidencing a transaction involving commerce." [FN66] Cingular argues that both elements have been met. The arbitration provision of the WSA is in writing, and cellular phone service is a transaction in interstate commerce.[FN67]

FN66. 9 U.S.C. § 2.

FN67. *See United States v. Weathers,* 169 F.3d 336, 341 (6th Cir.1999) ("It is well established that telephones, even when used intrastate, constitute instrumentalities of interstate commerce.").

Plaintiffs usury claims fall within the scope of the agreement because it specifically encompasses "all disputes and claims arising out of or relating to this Agreement, or any prior oral or written agreement" between the parties. [FN68] When an arbitration agreement is governed by the FAA and a dispute is within its scope, the court must compel arbitration and stay further judicial proceedings.[FN69] "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." [FN70] As a general matter, courts are required to "rigorously enforce agreements to arbitrate." [FN71]

FN68. Doc. No. 10-2.

FN69. *Ascension Orthopedics, Inc. v. Curasan AG,* No. A-06-CA-424, 2006 WL 2709058, *2 (W.D.Tex. Sept. 20, 2006).

FN70. *ING Financial Partners v. Johansen,* 446 F.3d 777, 779 (8th Cir.2006) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

FN71. *White v. J.C. Penney Co., Inc.,* No. 5-2977, 2006 WL 736965 (D.Minn. March 21, 2006) (quoting *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 226 (1987)).

IV. Conclusion

I find that Plaintiff entered into a valid contract under Arkansas law, that a valid arbitration agreement exists, and that the controversies in this case fall within the scope of the arbitration agreement. All of the elements required for a contract are present. There is no evidence that Plaintiff did not enter into the contract freely and intelligently. The contract and the arbitration provision impose mutual obligations and are not unconscionable.

The case administratively terminated. The parties may reopen the case if necessary at the close of arbitration. Defendant's Motion to Compel Arbitration is GRANTED.

IT IS SO ORDERED.

E.D.Ark.,2007.
Davidson v. Cingular Wireless LLC
Slip Copy, 2007 WL 896349 (E.D.Ark.)

END OF DOCUMENT

EXHIBIT 3

American Arbitration Association
Dispute Resolution Services Worldwide

FAX

6795 N. Palm Ave. 2nd Floor, Fresno, CA 93704
Telephone: 559 490 1900, Facsimile: 559 490 1919

DATE 4/22/08

TO Deborah Truby Riordan — Fax: 501-371-9905
Jan Mendel — Fax: ~~404-236-5575~~ 404.236.5535

FAX NUMBER 559-650-8029

FROM Mee Moua

NUMBER OF PAGES 3 (including cover page)

RE AAA Case No.: 74 420 309 08; Davidson v. Cingular Wireless

Mee Moua
WCMC/AAA
Direct: 559-650-8045
Mouam@adr.org

American Arbitration Association
Dispute Resolution Services Worldwide

John M. Bishop
Vice President, Case Management Center
Jeffrey Garcia
Assistant Vice President

6795 North Palm Ave, 2nd Floor, Fresno, CA 93704
telephone: 559-490-1900 facsimile: 559-490-1919
internet: http://www.adr.org/

April 22, 2008

VIA FACSIMILE ONLY

Deborah Truby Riordan
Wilkes & McHugh, P.A.
425 W. Capitol Ave., Ste. 3500
Little Rock, AR 72201

Jan Mendel
Litigation Analyist
AT&T Mobility LLC
5565 Glenridge Connector
Atlanta, GA 30342

Re: Barbara Davidson
Vs.
Cingular Wireless, LLC dba Cingular Wireless

Response Date: Tuesday, May 6, 2008

Dear Parties:

The claimant has filed with us a Demand for Arbitration of a dispute arising out of a contract between the above parties. We note that the arbitration clause provides for arbitration by the American Arbitration Association. The American Arbitration Association applies the *Supplementary Procedures for Consumer-Related Disputes* to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The *Supplementary Procedures for Consumer-Related Disputes* ("Consumer Rules") of the *Commercial Arbitration Rules* and the *Consumer Due Process Protocol* may be found on our web site at www.adr.org. You may also obtain a printed copy from the undersigned.

In order to determine if the arbitration agreement substantially and materially complies with the due process standards of the Consumer Due Process Protocol, the AAA reviews the parties' arbitration clause only, and not the entire contract. The AAA's review of the arbitration clause is only an administrative review to determine whether the clause complies with the AAA's minimum due process standards in consumer arbitrations. However, the AAA's review is not an opinion on whether the arbitration agreement, the contract, or any part of the contract is legally enforceable.

Pursuant to the Cingular Wireless arbitration clause, the **consumer** pays **$125** for the arbitrator's compensation, **which we have received**. The **business** pays **$750** for the administrative fee plus the balance of the arbitrator's compensation. At this time we are assuming that the balance of the arbitrator's compensation will be **$125, bringing the total due from the business to $875**.

Payment of these amounts is a filing requirement under the Consumer Rules. As such, we will not commence administration of this dispute until this filing requirement has been met. Outstanding payments should be received no later than **May 6, 2008**, and checks should be made payable to the American Arbitration Association. If the parties have not made full payment of these fees by that date, the Association may decline to administer this matter. Also note that should either party not pay their fees in accordance with the Consumer Rules, the opposing party has the option to do so, thereby allowing us to proceed with the administration of this case. That party may then request that the arbitrator assess these costs in the award, per the fee schedule.

Thank you for your time and consideration in this matter. Please direct any questions to the undersigned.

Sincerely,

/s/
Mee Moua
Intake Department
559 650 8045
Mouam@adr.org

Supervisor Information: Julie E. Collins, 559 650 8057, collinsj@adr.org

EXHIBIT 4

HP Officejet 7310
Personal Printer/Fax/Copier/Scanner 

Log for 
Cingular User
404-236-5590
May 02 2008 3:11PM

Last Transaction

Date	Time	Type	Identification	Duration	Pages	Result
May 2	3:09PM	Fax Sent	915596508078	1:12	5	OK

at&t Fax

To:	Julie Collins AAA	Fax:	559-650-8078
Date:	5/2/08	No. of pages:	5 (including cover sheet)
From:	Michael E. Cross, Esq.		
Subject:	Barbara Davidson v. Cingular Wireless Case No. 74 420 309 08		

American Arbitration Association
Dispute Resolution Services Worldwide

CHARGE CARD AUTHORIZATION

Please print or type

For Central Office Use

Processed by: _____ Date: _____

Approval Code: _____

Submitted by: _____ Date: _____

Case No: 74 420 309 08

Party Name: Barbara Davidson v. Cingular Wireless

Invoice#	Invoice Date	Amount
Admin. Fee	4/22/08	$750.00
Bal Due – Arb	4/22/08	$125.00

XX Visa _____ MasterCard _____ American Express

Amount Charged: $ 875.00

Account Holder Name: Michael E. Cross

Card Number: REDACTED

Expiration Date: _____

Michael E Cross
Signature

May 2, 2008
Date

Address: AT&T Mobility
5565 Glenridge Connector
Atlanta, GA 30342

EXHIBIT 5

For questions regarding this payment, please contact us at TPCAPSupport@cingular.com

7730 Market Center El Paso, TX 79911

DATE: 01-MAY-08 CHECK NUMBER 12713165

SPECL WILKES AND MCHUGH 1150438

INVOICE NUMBER	INVOICE DATE	DESCRIPTION	WITHOLDING AMOUNT	DISCOUNT	NET
IN28APR0812500	042908	ISCRDT_AAA1250428	0.00	0.00	125.00
		TOTAL	0.00	0.00	125.00

NON NEGOTIABLE DRAFT STUB - DETACH & RETAIN FOR YOUR RECORDS

DETACH CHECK ALONG THIS PERFORATION

at&t

7730 Market Center
El Paso TX 79912

JP Morgan Chase Bank, N.A.
New York, NY
Payable Through Chase Bank USA, N.A.

DATE 01-MAY-08 62-26/311 CHECK NUMBER 12713165

CHECK AMOUNT
$*********125.00

PAY
One Hundred Twenty-Five And No/100 Dollars

Void 180 days from check date

TO THE ORDER OF
WILKES AND MCHUGH
425 WEST CAPITOL AVENUE
SUITE 3500
LITTLE ROCK, AR 72201
United States

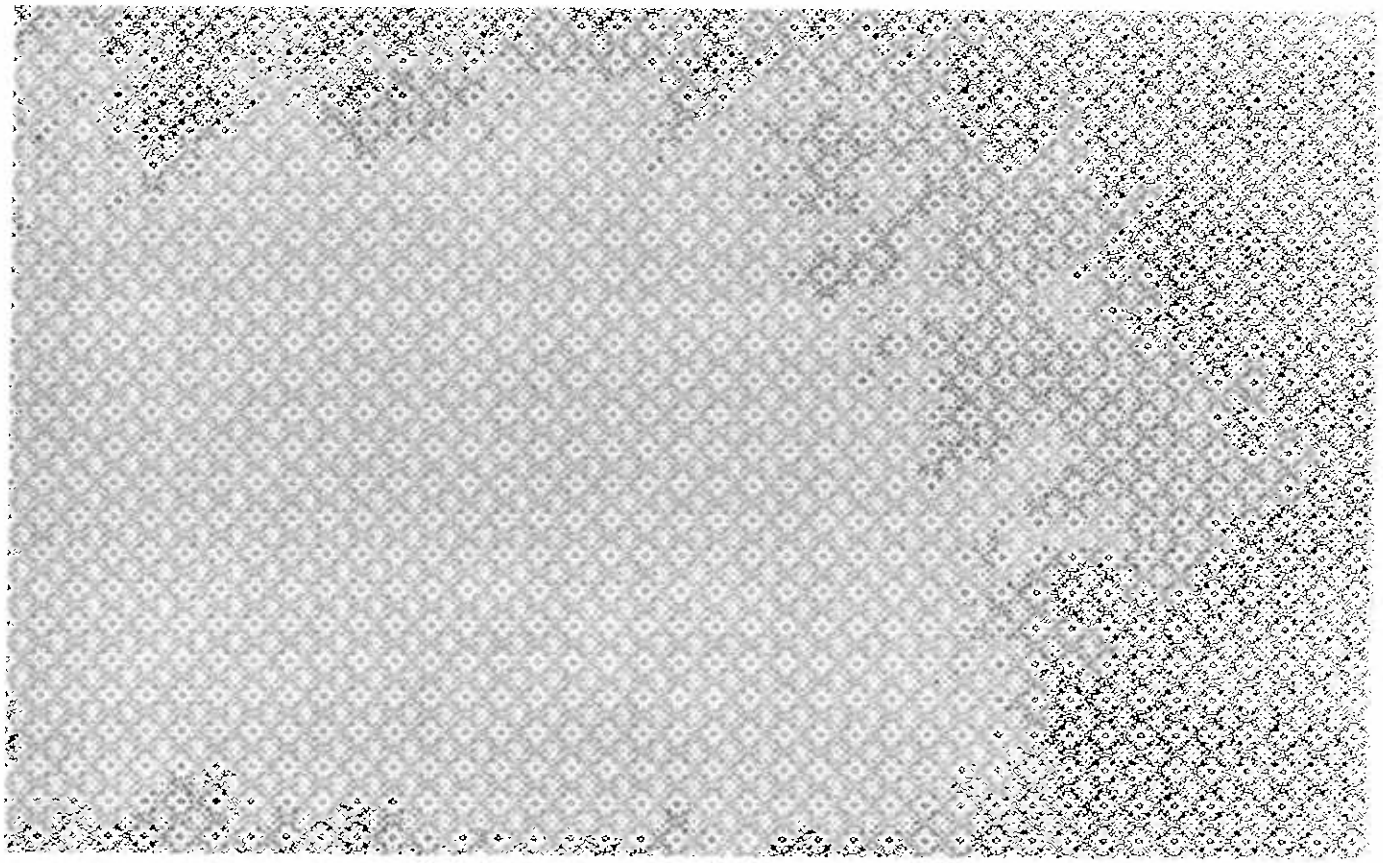
1150438

REDACTED

7730 Market Center
El Paso, TX 79912

at&

WILKES AND MCHUGH
425 WEST CAPITOL AVENUE
SUITE 3500
LITTLE ROCK, AR 72201
United States



From: Origin ID: TMAA (404)236-5564
Susan Palatini
AT&T Mobility
5565 Glenridge Connector
Suite 1700
Atlanta, GA 30342

Ship Date: 02MAY08
ActWgt: 1 LB
System#: 9265213/INET8010
Account#: S *********

Delivery Address Bar Code

Ref #
Invoice #
PO #
Dept #

SHIP TO: 888-777-9424 **BILL SENDER**

Ms. Deborah T. Riordan, Esq
Wilkes & McHugh, P.A.
425 W. Capitol Avenue
Suite 3500
Little Rock, AR 72201

TRK# 0201 7984 3339 9255

MON - 05MAY **A1**
STANDARD OVERNIGHT

XH LITA

72201
AR-US
MEM

After printing this label:
1. Use the 'Print' button on this page to print your label to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

Warning: Use only the printed original label for shipping. Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number.

Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com. FedEx will not be responsible for any claim in excess of $100 per package, whether the result of loss, damage, delay, non-delivery, misdelivery, or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim. Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental, consequential, or special is limited to the greater of $100 or the authorized declared value. Recovery cannot exceed actual documented loss. Maximum for items of extraordinary value is $500, e.g. jewelry, precious metals, negotiable instruments and other items listed in our ServiceGuide. Written claims must be filed within strict time limits, see current FedEx Service Guide.

EXHIBIT 6

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between

Re: 74 494 E 00309 08 JOJO
Barbara Davidson
VS
AT&T Mobility LLC

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and having been duly sworn, and oral hearings having been waived in accordance with the Rules, and having fully reviewed and considered the written documents submitted to me, do hereby, AWARD, as follows:

Introduction
The plaintiff, Barbara Davidson, brings a consumer demand for arbitration against Cingular Wireless, LLC and AT&T Mobility, LLC[1], pursuant to a federal court order granting Cingular's motion to compel arbitration. Davidson originally filed in the Circuit Court of Phillips County a complaint and then an amended complaint claiming violation of state usury law and violation of the Arkansas Deceptive Trade Practices Act. Cingular removed the case to federal district court and filed a motion to compel arbitration pursuant to Davidson's contract with Cingular. The United States District Court forth Eastern District of Arkansas granted Cingular's motion. Davidson's demand for arbitration alleges only violation of Arkansas usury law, and the Claimant stated her intention to pursue only the usury claim in this proceeding. At issue is whether late fees Cingular assessed on Davidson's wireless telephone account are usurious interest charges, or whether those fees are permissible late payment charges that are not subject to compliance with Arkansas's usury laws. For the reasons stated below, my award in this arbitration goes in favor of Cingular Wireless, LLC.

Parties' Allegations
Davidson's amended complaint alleges that Cingular has violated Arkansas usury law by charging late fees on Davidson's wireless telephone account that amount to interest on overdue account balances at an unlawfully high rate. Cingular answers that the late charges are not interest, but rather are non-compounded fees that serve as inducements to make prompt payments that can be avoided by tendering payment of charges in a timely fashion. The Arkansas Constitution provides that the maximum lawful interest on any contract is five percent per annum above the Federal Reserve Discount Rate at the time of the contract. Ark. Const. Art. 19, § 13(a)(i). Davidson counters that Cingular's contract forms specify that charges of a late fee are interest and not penalties.

Statement of Applicable Law
A late charge which is in the nature of a penalty will not render a transaction usurious. *Smith v. Figure World Plus, Inc., 288 Ark. 355, 705 S.W.2d 432 (1986)*; *Harris v. Guaranty Financial Corp.*, 244 Ark. 218, 424 S.W.2d 355 (1968). A charge labeled as a penalty, but which is really a subterfuge for interest, may render a transaction usurious; however, a late charge that is in the nature of a penalty will not. *Tackett v. First Savings of Arkansas, F.A.*, 306 Ark. 15, 810 S.W.2d 927 (1991). Whether a late payment charge is interest or a penalty is to be determined from the facts and circumstances of each case. *Id.* Two principal factors in determining whether the charge is a penalty are whether the charge is fixed in amount and whether it is assessed as a one-time charge. *Id.* A late charge that is fixed in amount and is not compounded is not usurious, even if the amount of the late charge is the same as the original obligation. *Smith*, 288 Ark. at 356, 705 S.W.2d at 433.

[1] The Claimant's allegations cover service contracts with both companies. For convenience, I will refer to the Respondent as "Cingular", but the analysis applies equally to both entities.

Analysis

Davidson's first argument is that Cingular stipulates on its contract forms and billing notices that the late fees it charges are interest on outstanding balances. Davidson presents two separate statements of Cingular's late payment fee agreement. The first is contained in a Southwestern Bell Wireless[2] service agreement form signed by Barbara Davidson on January 11, 2000. Davidson points out in excerpted language from that document that "[p]ayments not received within ten (10) days of the due date will be subject to a late monthly fee of ... (i) [sic] interest on the delinquent payment[.]" Quoted in whole, this sentence of the contract terms and conditions provides:

> Payments not received within ten (10) days of the due date will be subject to a monthly late fee of (i) a delinquency charge equal to the lesser of one and one half percent (1½%) of the delinquent payment or five dollars ($5.00) or (ii) interest on the delinquent payment, accruing after ten (10) days past due date, at a rate not to exceed the highest lawful contract rate.

(Plaintiff's Exhibit A.) The second statement of Cingular's late fee policy is incorporated into each monthly invoice for wireless phone service on the second page of the invoice under the heading of "General Information." That paragraph provides:

> A 'Late Payment Charge' may be assessed on any payments not received within ten days of the due date equal to the lesser of five percent of the delinquent payment or five dollars ($5.00) or interest on the delinquent payment, accruing after ten days past due, at the rate of 1.5% per month.

(Plaintiff's Exhibit B.) Davidson argues that this language states unequivocally that late fees Cingular has assessed on her account are interest. Cingular responds that the late fees it assesses on wireless telephone accounts are not interest because they are one-time penalties for failing to make prompt payment of charges due. Additionally, Cingular states that its "policy and practice is not to compound late fees." (Respondent's Br. at 8.)

Davidson's second argument is that the late fees are interest because Cingular's current contract terms and conditions stipulate that the late fees are "not...a penalty." (Claimant's Exhibit H.) Seizing on the analysis in *Tackett v. First Savings of Arkansas, F.A.*, 306 Ark. 15, 810 S.W.2d 927 (1991), of whether late fees assessed are interest or a penalty, Davidson reasons that if Cingular's contract terms and conditions provide that late fees levied on a wireless phone account are not a penalties, then they must be interest. This reasoning is flawed because it presumes that the same meaning attaches to the word "penalty" both in the Arkansas Supreme Court's opinion in *Tackett* and in Cingular's "Terms and Conditions" document. The Arkansas Supreme Court held in *Tackett* that a late charge of four percent of any monthly installment not received by the holder of a note within fifteen days after the installment was due was "a onetime penalty," of a fixed amount, which could have been entirely avoided by prompt payment. *Tackett*, 306 Ark. at 21, 810 S.W.2d at 931. Because the late fee was a non-compounded, discrete-event "penalty" to the maker of the note for failing to tender an installment payment in a timely manner, the Arkansas Supreme Court held that the late fee was not in the nature of interest charged on the note.

Here, Cingular uses the word "penalty" in the context of a boilerplate liquidated damages contract clause. The "Terms and Conditions" form provides:

> You agree that CINGULAR will incur damages, which are difficult to calculate, if you fail to pay your bill by the due date. Therefore, for amounts not paid by the due date, CINGULAR may apply, and you agree to pay a late payment fee per month equal to $5 or, if less, the highest amount allowed by law as liquidated damages and not as a penalty.

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[2] According to Davidson's complaint, Southwestern Bell Wireless is a member entity of Cingular Wireless, LLC. Cingular does not dispute this fact.

The term "penalty" is used in the above-quoted contract term only to ensure under common law of contracts that the agreed-upon late fee is a valid amount of liquidated damages in the event of late payment and is not void as a penalty. Thus, the meaning of the word "penalty" as it is used in *Tackett* does not also attach to the word as it is used in Cingular's "Terms and Conditions." Therefore, the fact that a Cingular wireless telephone subscriber agrees to pay a late payment fee not as a penalty is not material as to the issue of whether the late fees are levied as interest on outstanding account balances.

Davidson's final argument is grounded in the persuasive authority of a Clark County Circuit Court opinion from 2005. In *Pipkin Enterprises, Inc. v. Southwestern Bell Yellow Pages, Inc.*, the Circuit Court of Clark County found that late fees of one and one-half percent of past due amounts on a Southwestern Bell Yellow Pages account were interest charges at a usurious rate. *Pipkin*, however, is distinguished from the instant case by the circuit court's finding in that case that the deferred payment plan Southwestern Bell Yellow Pages offered to its advertising customers was a loan of money, and so consequently, late charges on such a payment plan were inescapably characterized as interest. The circuit court reasoned that the payment term of the contract between Pipkin Enterprises and Southwestern Bell Yellow Pages required payment for advertising in the Yellow Pages for the year of the publication in advance, and so the payment plan Southwestern Bell offered Pipkin was a financing arrangement. Here, there is no evidence that Davidson's failure to timely pay an amount due on her Cingular account is a loan of money from Cingular. To the contrary, Davidson's exhibits reveal that payment for wireless service is due by the due date, and any previous balance due that appears on a Cingular bill is due in full immediately. Because no loan of money is involved in the present case, the circuit court's findings in *Pipkin* provide no guidance.

The dispositive issue in this case is whether the late fees Cingular assesses its wireless telephone customers are in the nature of interest or of a penalty, and the proper query for determining this issue is whether Cingular compounds late fees upon late fees. A late fee that is fixed in amount and is not compounded is not usurious. *Smith*, 288 Ark. at 356, 705 S.W.2d at 433. In *Smith*, a contract for membership in a fitness club provided that members pay dues of $10 per month, but if any member failed to pay his monthly membership dues by the first of the month, that member was subject to a late payment fee of an additional $10. Thus, the contractual late payment fee equaled one hundred percent of the monthly dues. The Arkansas Supreme Court held that this late payment fee was not usurious interest because members were only liable for the fee if they failed to make a ten dollar payment by the first of each month. Even if a member's account carried a balance due, a late payment fee would not be levied if that member made a timely payment for the current month. Thus, the late payment fees analyzed in *Smith* were fixed in amount and assessed only as a one-time charge. As such, the late fees did not fit within the definition of interest. *See Tackett*, 306 Ark. at 15, 810 S.W.2d at 927.

Inasmuch as the dispositive issue in this case is to be determined on the facts and circumstances of the case, *id.* at 15, 810 S.W.2d at 927, the analysis inevitably becomes a forensic study of Cingular's invoices to Davidson on her wireless telephone account. Cingular's employee in the position of director of financial analysis, Troy Engnath, testified that Cingular's billing system assesses monthly late payment fees not on the total outstanding balance on a given account but rather only on a net figure of "eligible items" that excludes certain software purchases, cost recovery fees, any unpaid late fees from a prior month, and any past due balance from a prior month. (Declaration of Troy Engnath, ¶ 9, October 20, 2008.) Engnath testified that AT&T does not compound late fees and charges only a single late fee for any single instance of an overdue balance. (*Id.*, ¶ 10.) Davidson counters that Engnath's testimony is "unreliable" and presents her own tabular report of late fees and calculated interest amounts. I find from my own examination of the invoices on Davidson's Cingular account that Engnath's description of how AT&T calculates late fees is credible.

As an example, the invoice for the billing cycle of 12/14/04 to 1/13/05 shows a past due balance of $115.76 and total current charges of $88.34. The past due balance is noted as "payable immediately," and the current charges are noted as due February 3, 2005, with late fees assessed after February 13. Page 3 of that invoice reveals that Cingular bills for wireless telephone service in advance of providing service.

The bill is dated 1/13/05, and the billed service period is 1/14/05-2/13/05. The invoice for the billing cycle of 1/14/05 – 2/13/05 shows that Davidson made a payment of $115.76 by direct account debit on February 7, 2005. She did not, however, pay the "total current charges" of $88.34 that were due February 3, 2005, for which late fees would be assessed on February 13. This second invoice shows that Cingular assessed a late fee of $1.29. There is no posted date for this late fee, but given that the invoice is dated 2/13/05, it may be reasonably assumed that the late fee was posted on February 13 as Cingular forewarned on its 1/13/05 invoice.

The late fee of $1.29 is one and one half percent of $86.00, which is $2.34 less than the "total current charges" of $88.34 on the 1/13/05 invoice. On the 1/13/05 invoice, the cost recovery fee was $0.56, the prior period's late fee was $1.76, and the federal excise tax was $0.05. These add to $2.34, thus corroborating Troy Engnath's testimony of how Cingular calculates late fees. I have verified that this same calculation balances on other invoices for different billing periods. Therefore, it is my finding of fact that Cingular does not compound late fees, and it is my conclusion as a matter of law that the late fees Davidson was charged on her Cingular wireless telephone account were not interest.

Arguments Not Addressed

Cingular presents an additional argument that the Telecommunications Act of 1996 preempts Arkansas's usury law, and Davidson also argues that the one and one-half percent late fee is usurious because it normalizes to a usurious annual rate of eighteen percent. Because these arguments are not necessary to my findings of fact and conclusions of law, I decline to address them.

Conclusion

Pursuant to Arkansas law, the late fees at issue in this case are not interest and are not subject to Arkansas usury law. Because Cingular's contractual late fees are not interest, Davidson's claim of violation of usury law cannot prevail. Therefore, award of this arbitration goes to the respondent, Cingular Wireless, LLC.

The administrative filing and case service fees of the AAA, totaling $750.00, shall be borne as incurred.

The fees and expenses of the arbitrator(s), totaling $250.00, shall be borne as incurred.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

11/17/08
Date

David M. Fuqua